

SERVICE DATE – AUGUST 3, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1232

TOWN OF NORTH JUDSON, IND.—ADVERSE DISCONTINUANCE OF SERVICE—IN  
LAPORTE, PORTER, AND STARKE COUNTIES, IND.

Decided: August 3, 2015

By motions filed on May 11 and 22, 2015 (collectively “the Motions to Compel”), Chesapeake & Indiana Railroad, Inc. (CKIN) asks the Board to compel the Town of North Judson, Ind. (the Town), to respond to discovery requests that CKIN served on the Town. In this decision, the Board finds that, while most of CKIN’s discovery requests seek information not relevant to the issues before the Board in this proceeding, some requests seek information that could lead to the discovery of admissible evidence. Therefore, the Board will grant in part and deny in part the Motions to Compel.

BACKGROUND

In May 2004, the Board approved the Town’s offer of financial assistance to acquire from CSX Transportation, Inc. most of an approximately 33.37-mile rail line in LaPorte, Porter, and Starke Counties, Ind., extending between milepost CF 0.23 at or near LaCrosse and milepost 15.23 at or near Wellsboro and between milepost 212.55 at or near North Judson and milepost 230.92 at or near Malden (the Line).<sup>1</sup> CSX Transp., Inc.—Aban. Exemption—in LaPorte, Porter, & Starke Cntys., Ind., AB 55 (Sub-No. 643X) (STB served May 14, 2004). Shortly thereafter, in August 2004, the Town hired CKIN to provide service over the Line pursuant to a Railroad Operating Agreement (Operating Agreement), which expires on December 31, 2015.<sup>2</sup> Chesapeake & Ind. R.R.—Operation Exemption—Town of North Judson, Ind., FD 34529 (STB served Aug. 20, 2004).

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<sup>1</sup> The Board proceedings granting the Town authority to acquire the Line, and CKIN authorization to operate on the Line, related to only 32.97 miles of railroad in LaPorte, Porter, and Starke Counties, Ind., extending from milepost CF 0.63, at LaCrosse, to milepost CF 15.23, at Wellsboro, and from milepost CI 212.55, at North Judson, to CI 230.92, at Malden. See e.g., CSX Transp., Inc.—Aban. Exemption—in LaPorte, Porter, & Starke Cntys., Ind., AB 55 (Sub-No. 643X) (STB served Apr. 28, 2004). The Town will need to address this discrepancy when it files its application for adverse discontinuance.

<sup>2</sup> CKIN describes the Line slightly differently than the Town, stating in its reply that the Line extends between milepost CF 0.23 at or near North Judson and milepost 230.92 at or near Malden. Reply Appendix 1, May 4, 2015.

On April 16, 2015, the Town filed a petition for waiver and exemption of certain Board regulations and statutory provisions in connection with a planned filing of a third-party or “adverse” discontinuance application to terminate CKIN’s common carrier authority over the Line. In its petition, the Town states that it does not expect CKIN to willingly cease operations on the Line on January 1, 2016, upon expiration of the Operating Agreement. The Town states that it wishes to replace CKIN as operator on, or as soon as possible after, that date.

On the same day that the Town filed its petition, CKIN submitted a letter advising the Board that it opposes the Town’s petition for waiver of certain discontinuance requirements. CKIN filed a reply further explaining its opposition to the Town’s petition on May 4, 2015. The Board ruled on the petition for waiver in a decision served on July 27, 2015.

On May 11, 2015, CKIN filed a motion asking that the Board compel the Town to answer five requests for admission that CKIN submitted to the Town (May 11 Motion). The Town filed a reply to the May 11 Motion on May 20, 2015, asserting that CKIN’s requests for admission were not relevant to the adverse discontinuance proceeding. On May 22, 2015, CKIN filed a second motion to compel, asking that the Board compel the Town to respond to interrogatories and requests for production of documents it had served on the Town (May 22 Motion). The Town filed a reply to the May 22 Motion on May 27, 2015, again arguing that the information sought was not relevant to this proceeding. On July 1, 2015, Co-Alliance, LLP filed additional information related to the proceeding.

CKIN’s Motions to Compel will be granted in part and denied in part, as discussed below.

## DISCUSSION AND CONCLUSIONS

In Board proceedings, parties are entitled to discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a)(1). “The requirement of relevance means that the information might be able to affect the outcome of a proceeding.” Waterloo Ry.—Adverse Aban.—Lines of Bangor & Aroostook R.R. & Van Buren Bridge Co. in Aroostook Cnty, Me., AB 124 (Sub-No. 2) et al. (STB served Nov. 14, 2003). Further, it “is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” 49 C.F.R. § 1114.21(a)(2).

Request for Production Nos. 3-10 and 15-18, Interrogatory Nos. 25-26, and Request for Admission Nos. 2-5. In Request for Production Nos. 3-10 and 15-18, CKIN asks for communications and agreements between the Town and the Indiana Department of Transportation (Indiana DOT) and Porter, LaPorte and/or Starke Counties relating to the Line and the Railroad Fund. Interrogatory Nos. 25-26 and Request for Admission Nos. 2-5 ask for information relating to funding for the 2004 purchase of the Line.

CKIN states that these requests seek to establish that Indiana DOT and LaPorte, Porter, and Starke Counties financed the Town’s acquisition of the Line in 2004 so that, in CKIN’s

view, the Town lacks standing to file an adverse discontinuance application in this case. For the same reason, CKIN alleges that the Town may not be able to legally terminate CKIN's service over the Line without the cooperation and approval of Indiana DOT and LaPorte, Porter, and Starke Counties.

The Board has found that "[t]he statutory provisions and regulations governing discontinuances and abandonments permit any entity with a cognizable interest to pursue adverse discontinuance or abandonment authority." Waterloo Ry.—Adverse Aban.—Lines of Bangor & Aroostook R.R. & Van Buren Bridge Co. in Aroostook Cnty., Me. (Waterloo), AB 124 (Sub-No. 2) et al., slip op. at 4 (STB served May 3, 2004). Because it owns the Line, the Town has a cognizable interest in the outcome of this adverse discontinuance proceeding regardless of how the acquisition was financed.<sup>3</sup> Therefore, CKIN's discovery requests seek information not relevant to the issues to be addressed by the Board in this proceeding. Accordingly, CKIN's request to compel responses to these requests will be denied.<sup>4</sup>

Request for Production Nos. 1-2 and 19 and Interrogatory Nos. 10-13 and 22-23. Request for Production Nos. 1-2 and 19 seek documents relating to meetings of the Railroad Committee, agreements under which the Town received federal funding for a tie replacement program, and documents relating to Railroad Fund transactions. Interrogatory Nos. 10-13 request information relating to the activities and membership of the Railroad Committee and parties to the Tie Replacement Service contract. Interrogatory Nos. 22-23 seek information relating to Town employees and representatives who had "involvement with" the Line or to whom the Town provided maintenance, confidential traffic, or confidential financial information for the Line.

CKIN asserts that the information sought in these requests will show that the Town has a close working relationship with the Hoosier Valley Railroad Museum (the Museum) and that the Town intends to replace CKIN as operator with the Museum. CKIN states that this alleged intent makes the proceeding a forced discontinuance of trackage rights by the tenant railroad carrier. The Town responds that its dealings with the Museum have no bearing on the Town's forthcoming adverse discontinuance application to remove CKIN as operator. The Town also states in its reply that it does not intend to replace CKIN with the Museum as the operator on the Line.

In light of the Town's statement that the Museum will not be the replacement operator on the Line if the adverse discontinuance is authorized,<sup>5</sup> the Board finds that these discovery

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<sup>3</sup> See CSX Transp., Inc.—Aban. Exemption—in LaPorte, Porter, & Starke Cntys., Ind., AB 55 (Sub-No. 643X) (STB served May 14, 2004).

<sup>4</sup> The Board notes that the Town served its petition for waiver on Indiana DOT and LaPorte, Porter, and Starke Counties. As a result, these entities have notice of the Town's intent to file an adverse application to discontinue CKIN's operations on the Line and are free to participate in the proceeding.

<sup>5</sup> The Board interprets the Town's representation to include any alter egos of the Museum, including new entities.

requests seek information and documents that are not relevant to this proceeding. Accordingly, the Board will deny CKIN's request to compel a response to these requests.

Interrogatory Nos. 14-18 and 24 and Request for Admission No. 1. In Interrogatory Nos. 14-18, CKIN seeks information relating to the Request for Proposal (RFP) process for operating the Line that took place in 2004 and expressions of interest in operating the Line in the future. In Interrogatory No. 24 and Request for Admission No. 1, CKIN seeks information relating to whether the Town adopted Indiana Code 5-23 et seq.

CKIN states that Interrogatory Nos. 14-18 and 24 and Request for Admission No. 1 seek information to show that service over the Line would cease if the Board authorizes adverse discontinuance because the Museum lacks expertise to operate the Line. Alternatively, CKIN argues that, if the Town terminates CKIN's services following a grant of adverse discontinuance, then the Town would have to solicit new operators through the RFP process, which would cause a delay in acquiring a new operator and result in a lapse in operations. CKIN asserts that this would support its claim that the Board should treat this as an adverse abandonment proceeding because "cessation of rail service is a distinct possibility."<sup>6</sup>

In reply, the Town states that it would not replace CKIN with the Museum and that it would ensure against a lapse in operations by asking that the Board impose a condition on its adverse discontinuance authority requiring that an orderly transition of operations occur before CKIN terminates service.

In light of the Town's representations, there is no reason to believe that there would be a lapse in operations on the Line. As a result, these requests do not seek relevant information and documents, and CKIN's request to compel them will be denied.

Request for Production Nos. 20-22. In Request for Production Nos. 20-22, CKIN seeks communications and agreements between the Town and the Museum that relate to the Line, as well as maps, photos, diagrams, and videos relating to the Museum's operations over the Line.

CKIN asserts that these documents are needed to show that the Town and Museum do not have sufficient expertise to operate a railroad and that, if either the Town or the Museum were to replace CKIN, there would be a negative impact on rail service on the Line. Because the Town has stated that neither it nor the Museum would be the replacement operator on the Line, these requests seek information not relevant to this proceeding, and the Board will deny the motion to compel responses to them.

Request for Production Nos. 23-24 and Interrogatory Nos. 4-9 and 19-20. Request for Production Nos. 23 and 24 and Interrogatory Nos. 4-9 seek documents and information relating to notices of default sent by the Town to CKIN. Interrogatories 19 and 20 seek information relating to potential environmental violations by the Town, the Museum, or CKIN and any communications between any state or federal agency and the Town, the Museum, or CKIN relating to safety violations on the Line.

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<sup>6</sup> May 22 Motion 6.

CKIN states that these requests seek information regarding whether the Town expressed dissatisfaction with CKIN's service prior to 2014. CKIN asserts that its investment in, and efforts on, the Line have increased the Line's traffic and productivity and, therefore, this case is distinguishable from "those cases in which a tenant's service is no longer wanted or needed."<sup>7</sup>

In reply, the Town argues that these discovery requests are not relevant to the proceeding because it seeks to change operators upon expiration of the Operating Agreement. The Town states that, under these circumstances, it has the right to change operators regardless of the existence of any alleged default by or dissatisfaction with CKIN's service.

In Board proceedings, parties are entitled to discovery "regarding any matter, not privileged, which is relevant to the subject matter" of the proceeding. 49 C.F.R. § 1114.21(a)(1). Here, even though the Town seeks to replace CKIN after expiration of the Operating Agreement, we find that allowing discovery regarding CKIN's performance could be relevant, for example, by providing information regarding the impact of a discontinuance on shippers, the community, and interstate commerce. See Waterloo, slip op. at 4 (stating that "the Board balances the competing benefits and burdens of abandonment or discontinuance on all interested parties"). Therefore, the information and documents requested seek information that could lead to the discovery of admissible evidence and the Board will grant the request to compel responses to these requests to the extent the Town has not already responded.

Request for Production No. 25. Request for Production No. 25 seeks communications and documents sent to and from the Town and customers on the Line. CKIN states that Request No. 25 seeks to establish that the Town and Museum would not protect the interests of shippers on the Line if they were to operate the Line and, therefore, the information sought is relevant. In reply, the Town states that it responded to Request for Production No. 25 in its Response to First Set of Requests for Production, dated May 13, 2015, identified the only document responsive to this request, and asserted a claim of privilege for this document. The Town states that CKIN does not allege that other relevant documents were not produced and does not dispute that the document is privileged.

Because CKIN does not challenge the Town's assertion of privilege or contend that the Town has withheld additional responsive documents, CKIN has not shown that the Town's response to this request is insufficient. Therefore, the Board will deny the request to compel an additional response to this request.

Interrogatory No. 21. Interrogatory No. 21 requests information relating to communications between the Town and any government agency having responsibility over historic preservation matters. CKIN states that this information is relevant because it would show that the Town and the Museum are "poor historic preservation stewards."<sup>8</sup> The Town states that it has fully responded to that interrogatory in its Response to First Set of Interrogatories, dated May 13, 2015. Because CKIN does not contend that the Town withheld

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<sup>7</sup> May 22 Motion 7.

<sup>8</sup> May 22 Motion 8.

additional responsive information or otherwise explain how the Town's response to this interrogatory is insufficient, the Board will deny the request to compel a response to Interrogatory No. 21.

It is ordered:

1. CKIN's Motions to Compel are granted in part and denied in part, as discussed above.
2. This decision is effective on its date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.